Supreme Court, U.S.
FILED
95-214 AUG 7 - 1995
No. OFFICE OF THE CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

_____ TERM, 19____

SYLVIA DeANGELIS, Petitioner

v.

EL PASO MUNICIPAL POLICE OFFICERS ASSOCIATION, Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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## INDEX


| | | Page |
|---|---|---|
| 1. | Decision of the U. S. Court of Appeals for the Fifth Circuit, May 10, 1995 | 1-27 |
| 2. | Amended Final Judgment of the U. S. District Court for the Western District of Texas, El Paso Division, signed September 2, 1993 and filed September 7, 1993 | 28-34 |
| 3. | Determination of the Equal Employment Opportunity Commission, March 26, 1990 | 35-43 |
| 4. | "looking Down Your Sights", by R.U. Withmi, *E.P.M.P.O.A. Silver Badge* February, 1990 (Exhibit P-12) | 44-50 |
| 5. | Memo dated February 27, 1990 from John Scagno, Chief of Police (Exhibit P-17) | 51-52 |

**Sylvia DeANGELIS, Plaintiff-Appellee,**

**v.**

**EL PASO MUNICIPAL POLICE OFFICERS ASSOCIATION, Defendant-Appellant.**

No. 93-8700

United States Court of Appeals,
Fifth Circuit.

May 10, 1995.

Appeal from the United States District Court for the Western District of Texas.

Before JONES and DeMOSS, Circuit Judges, and SHAW*, District Judge.

EDITH H. JONES, Circuit Judge:

The principal issue in this case is whether a jury verdict for the plaintiff in a Title VII sexual harassment case may be supported only by evidence of a few written jibes, at women police officers generally

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* Chief Judge of the Western District of Louisiana, sitting by designation.

and the plaintiff in particular, published in the police association newsletter. We hold that such evidence, rife as it is with first amendment overtones, will not suffice and so reverse the judgment.

BACKGROUND

After six years on duty with the El Paso Police Department as a patrol officer and detective, Sylvia DeAngelis became the first female sergeant in October, 1987. Within a few months of promotion, she was satirized by an anonymous writer in *The Silver Badge*, a newsletter of the El Paso Municipal Police Officers Association (the Association), an organization similar to a police officers union.[1] The author's *nom de plume* was R. U. Withmi. He wrote as a patrol officer with nearly 20 years' experience "combatin' crime." His monthly column criticized, in

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[1] We reject the Association's assertion that it is not a labor organization subject to Title VII. 42 U.S.C. § 2000e(d)(e).

an irreverent and colloquial manner, groups including superior officers, "rear echelon" officers ("REMF's"), bureaucrats, and "weenie boys." R. U. Withmi lashed out at changing times in the police department while longing for the good old days. The incursion of females into the department, a quintessential element of modernization, did not escape his sharp pen.

This lawsuit arises from several of his columns, published between November 1987 and February 1990, that derogatorily referred to policewomen. About a thousand copies of *The Silver Badge* were printed monthly and distributed at a minimum to 700 police officer members of the Association.

Publication of the columns angered more than two dozen female police officers, who asked the police chief and officers of the Association to stifle R. U. Withmi. The police chief, despite his discomfiture, had

no direct authority over the Association, and the Association, after a vote of the membership in early 1990, rejected their leaders' advice to require that R.U. Withmi unmask himself.

Peculiarly, although specifically offered the opportunity, none of the policewomen ever chose to write a response to R.U. Withmi for *The Silver Badge*.[2] The record mentions no boycott of the Association or its newsletter, no challenge to the officers' election. Sergeant DeAngelis' Title VII claims are before this court.

*DISCUSSION*

DeAngelis secured jury findings that (1) R.U. Withmi's articles subjected her to harassment, creating a hostile and sexually abusive working environment, and (2) a

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[2] Except perhaps a brief anonymous editorial from "I.N. Wifya" which expressed disgust and disagreement with R.U. Withmi on a variety of issues including remarks about the attractiveness of the new female recruits.

reference in one of the columns to her "E-I-E-I-O" [EEOC] complaint amounted to retaliation for exercise of her Title VII rights. The jury awarded Sergeant DeAngelis $10,000 in compensatory damages and $50,000 punitive damages.[3]

The Association has appealed on several grounds, the most compelling of which are sufficiency of evidence of liability and the assertion that, if this verdict is upheld, the First Amendment free speech rights of R.U. Withmi have been abridged. These issues must be discussed together.

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[3] Although the events that gave rise to this case predate the Civil Rights Act of 1991, which first permitted award of compensatory and punitive damages in Title VII claims, the Association as appellant has never asserted the non-retroactivity of those provisions. *But see Landgraf v. USI Film Prod.*, __U.S.___, ___, 114 S.Ct. 1483, 1508, 128 L.Ed.2d 229 (1994) (holding that provisions of the Civil Rights Act of 1991 creating a right to recover compensatory and punitive damages under Title VII do not apply to cases pending on appeal when statute was enacted).

[1] In reviewing a jury verdict, we abide by the standard set forth in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc). We consider the evidence in the light most favorable to the party defending the verdict, and we will reverse only when reasonable minds in the exercise of impartial judgment could not have arrived at that verdict. *MacArthur v. Univ. of Texas Health Center at Tyler*, 45 F.3d 890, 896 (5th Cir. 1995).

To establish an actionable claim of sexual harassment in the workplace, a plaintiff must demonstrate:

> (1) That she belongs to protected class; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment affected a "term, condition or privilege of employment"; and (5) that the employer either knew

or should have known of the harassment and failed to take prompt remedial action.

*See Jones v. Flagship International*, 793 F.2d 714, 719-20 (5th Cir.1986), *cert denied*, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987). The Supreme Court recently affirmed that sexually discriminatory verbal intimidation, ridicule and insults may be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment that violates Title VII. *Harris v. Forklift Systems, Inc.* — U.S. —, —, 114 S.Ct. 367, 370-71, 126 L.Ed.2d 295 (1993) (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986)).

*Nash v. Electrospace System, Inc.* 9F.3d 401, 403 (5th Cir. 1993).

[2-4] A claim for a sexually hostile working environment is not a trivial matter. Its purpose is to level the playing field for women who work by preventing others from impairing their ability to compete on an equal basis with men. One must always bear this ultimate goal in mind. A hostile environment claim embodies a series of criteria that express extremely insensitive conduct against women, conduct so egregious as to alter the conditions of employment and destroy their equal opportunity in the workplace. Any lesser standard of liability, couched in terms of conduct that sporadically wounds or offends but does not hinder a female employee's performance, would not serve the goal of equality. In fact, a less onerous standard of liability would attempt to insulate women from everyday insults as if they remained models of Victorian reticence. A lesser standard of liability would mandate not equality but

preference for women: it would create incentives for employers to bend over backwards in women's favor for fear of lawsuits. Now that most American women are working outside the home, in a broad range of occupations and with ever-increasing responsibility, it seems perverse to claim that they need the protection of a preferential standard. The careful, heightened phrasing of a hostile environment claim, enforceable where working conditions have palpably deteriorated because of sexually hostile conduct, aims to enforce equality, not preference.

[5-6] To test whether Sergeant DeAngelis' evidence satisfied the standard of liability, we return to the separate criteria for a hostile environment claim: (1) sexually discriminatory intimidation, ridicule and insults, which are (2) sufficiently severe or pervasive that they (3) alter the conditions of employment and

(4) create an abusive working environment. *Harris*, __ U.S. at ___, 114 S.Ct., at 370 (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)). *Harris* added:

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.

*Id.* In determining whether a working environment is "hostile" or "abusive", all the circumstances must be considered, including

> the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

*Id*, at ___, 114 S.Ct. at 371. The test is an objective one, *not* a standard of offense to a "reasonable woman." See *Harris*, __ U.S. at _____, 114 S.Ct. at 370.

[7] Lacking any other evidence of sexual discrimination or harassment, DeAngelis stakes her case on R.U. Withmi's columns and their effects. We will summarize each column that was offered at trial as critical of Sergeant DeAngelis or women police officers in general. Each column bore this disclaimer:

> R.U. Withmi is a senior level patrol officer whose article appears monthly. It does not represent the official position of the EPMPOA [the Association] but presents a humorous satirical view by the author. Written comments to the editor are welcome.

One must infer that because the R.U. Withmi column appeared monthly in *The Silver Badge*,

and the challenged articles appeared over a course of 30 months, none of the twenty articles not offered in evidence at the trial court was hostile to women.

1. *December 1987* - Well-low and BE-hold!!, the Holiday Season is here! It seems like just the other day we got a new Chief and them 87 low bid police cars had just arrived. As the new year fast approaches these here parts and we all git just a little older, I has begun to get a lil' nostalgic in my old age a remeberin' when things was a little different. It is my opinion that we here are in a new age of patrolmen, patrolwoman, defectowoman, sergeant dingy woman and now thanks to the appeal process, patrol other! I just think a people are changing and we are getting a new generation of patrolmen in as few as five years! I remember the good ol' days

when finding the criminal was more important to the patrolmen then keeping your hair in place! I wonder how far back you remember? I remember these things, let's see if you do ... Remember when? ... Do you remember when there were no women workin' the streets? (Ah yes, those were the good days! ... Sorry gals, truth hurts!) ...

2. *February 1988* - I never thought I would make the newspaper El Paso Rag, an E-I-E-I-O- complaint or be blasted out of my socks by our Presidente himself!

3. *March 1988* - ... only REAL MEN wear them ole wool pants! You don't see any of the "jefes" with a bottle of hair spray on their Sam Browns! ... And I don't EVEN want to start up against the "girls" so my Commandante Presidente don't get "scared" again with his poison pen!

4. *August 1988* - I was surprised to think they were also training some good lookin' K-9s up there but I was told those were the female recruits! I swear!, complete with collars! Oh well, my mistake!

5. *October 1988* - I understand I done rustled the feathers of a few Female Recruit Officers and their "Daddys" up there on the "HILL." Well, ole' RU's a so sorry because I sometimes get carried away with tellin' things they way it is. Don't worry, I think I was wrong because the public will treat you with all the "respect" you deserve IF you get out there, and they will never call you names other than "officer." And wherever you answer the call, you will always get the cooperation you deserve. And no one will call you names to your face. So, life will be a bowl of cherries on the streets

and everythin' you've been told is the truth ...

6. January 1989 - ... now the patrol stations have to pull out a FULL DUTY policeMAN from the field to do the desk work! ... I just want a car that works, and a supervisor with some sense ... and a female officer that places her ability before her gender and IA out of my way!

7. February 1989 - ... with just one whack of the pluma we had musical supervisors all over the City.... Chances are purty darn good that we all probably know who the real problem was. But no names these days because of them EEOC Fed boys!

8. July 1989 - Anyway, fly that flag, be glad yore American, have a job, are male, and workin' patrol.

9. February 1990 - We had a hell-uva BS session at shift meeting (a place REMF's know nuthin' about!) regarding women in combat.... Physically, the

police broads just don't got it! Different standards or not, on the real streets the crooks don't fight women different than men! Why shoot, a guy weighing 140 pounds is just a lil' bird to me, but a fit to fight police broad of 140 pounds ain't just around that often! Someone tell me I'm wrong![4]

10. April 1990 - My academy Joe weenie partner dun informed me that this here bits o truth I writes each months just plain gots alotta folks supportin' it!

Sergeant DeAngelis acknowledged that only the first column directly referred to her - as Sergeant "dingy woman," evidently a shorthand expression for "dingbat." She asserts that the column concerning her "E-I-E-I-O complaint" ridiculed her as well as EEOC. Another column singled her out as one of the few officers to carry a flashlight on

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[4] This column spawned the class action lawsuit in state court by 22 women police.

her belt in the daytime. And she believes that the reference to musical supervisors in the February 1989 column implied that her troubles caused a shift around the police department. All of the other columns, DeAngelis conceded, refer to women in general, as was brought home to the police department and the Association by the uproar of many female police officers at their appearance.

Whether the four columns that refer to DeAngelis, taken alone or in conjunction with the other six columns appearing at irregular intervals in two and a half years, amounted to severe or pervasive sexually discriminatory intimidation, ridicule or insults depends in part upon their context. The R.U. Withmi column did not represent a boss's demeaning harangue, or a sexually charged invitation, or a campaign of vulgarity perpetrated by coworkers: the column attempted clumsy, earthy humor. R.U.

Withmi intended to be a curmudgeon, the police department's Archie Bunker or Homer Simpson, who eyed with suspicion all authority figures, academy-trained officers, police dispatchers, newfangled procedures and gear - whatever had changed from the old days. Misogyny naturally came with R.U.'s territory, although, against the backdrop of his other barbs, it can hardly be called an obsession. In any event, much of his humor lacked volatility: his reference to a police officer as a "policeMAN" or his exhortation to "be glad you're male ..." for instance, hardly rank in the firmament of sexist vilification.

On occasion, the column was forced to acknowledge criticism and apologize in its way to its victims such as the dispatchers, female recruits, and the "Daddys' up there on the Hill." The column's severest attack on women - which compared police work to R.U.'s combat experiences in Viet Nam - may

be read to include self-criticism: it notes that a hush fell over the room when this subject was discussed. That column did not refer to DeAngelis. R.U. Withmi columns ceased being published sometime during 1990.

We conclude that these columns are the equivalent of the "mere utterance of an ... epithet which engenders offensive feelings in an employee." *Meritor Savings*, 477 U.S. at 67, 106 S.Ct. at 2405. Consequently, they were not severe or pervasive enough to create an objectively hostile or abusive work environment. *Harris*, __ U.S. at ___, 114 S.Ct. at 370. Four printed derogatory references to Sergeant DeAngelis at irregular intervals in two and a half years do not evince sufficient hostility toward her as a matter of law.

Our conclusion is fortified by DeAngelis' extremely weak evidence of the impact of those articles. She testified that on two

specific occasions following the publication of the first article, junior officers behaved insubordinately to her. On both occasions, her reprimands against the subordinates were upheld. She surmised that these supervision problems, as well as other incidents of disrespect for her authority, were inspired by the R.U. Withmi columns. She testified subjectively that the appearance of the articles caused her great humiliation, destroyed her self-confidence, deterred her from applying for a promotion to lieutenant, and caused her to be the brunt of "dingy woman" comments. There was no other testimony supporting DeAngelis' belief that the articles impaired her performance. Her performance ratings remained good. When she complained to the police chief and others in command, they responded supportively. They, as well as the board of the Association, tried to suppress the R.U. Withmi column, or

discontinue its anonymity. The Association-President Breitinger wrote a letter to *The Silver Badge* defending the female officers.

Further, judged by the "totality of the circumstances" set out in *Harris*, this case is hardly as compelling as many reported Title VII sexually hostile environment claims. First, DeAngelis was subjected to no overtly discriminatory professional treatment. She was not a victim of ridicule before her promotion to become the first woman sergeant in the police department. *See Harris*, ___U.S. at ___, 114 S.Ct. at 319; *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir.1990) (derogatory and sexual remarks and conduct against female police officer). Second, no physical or sexual advances were made on DeAngelis, as has been characteristic of many hostile environment claims. *See, e.g., Waltman v. Int'l Paper Co.*, 875 F.2d 468 (5th Cir.1989)

(female employee was repeatedly sexually groped and propositioned); *Carr v. Allison Gas Turbine Div. Gen. Motors*, 32 F.3d 1007 (7th Cir.1994) (co-workers of female tinsmith cut her overalls and accompanied exposure of themselves with lewd sexual innuendos); *Arnold v. City of Seminole*, 614 F.Supp. 853 (E.D. Okla.1985) (female police officer subjected to lewd and vulgar sexual comments and innuendos, and discriminatory employment action). Third, DeAngelis was not preyed upon by a superior whose actions could be interpreted as an abuse of power against a subordinate employee. *Harris*, __U.S. at ___, 114 S.Ct. at 369; *Jones v. Flagship International*, 793 F.2d 714 (5th Cir.1986), *cert. denied*, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987). She was herself in a command position. Fourth, apart from the claimed impact of the articles, there is no evidence of an atmosphere

of sexual inequality or sexually demeaning treatment within the El Paso Police Department, her employer. On the contrary, representatives of the police department testified that they were embarrassed about and exhorted against the R.U. Withmi columns. Chief Scagno twice distributed memoranda throughout the police department condemning the R.U. Withmi columns.[5]

Because we have concluded that insufficient evidence supports DeAngelis' claim of a sexually harassing work environment, we do not reach the difficult question whether Title VII may be violated by expressions of opinion published in the R.U. Withmi columns

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[5] After unsuccessfully attempting to publish a letter in *The Silver Badge* condemning the columns, Chief Scagno distributed his letter to all personnel. Chief Scagno wrote, "I feel all these attacks have been totally one-sided, and in some cases chauvinistic, and racist.... Basically, in regards to the column by R.U. Withmi, instead of bringing important things to light for officers as an article such as this should, the column has become derisive and nothing more than a public platform for the author's personal opinions and prejudices."

in the Association's newsletter. Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech.[6] *See* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 U.C.L.A. L.Rev. 1791 (1992); Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 Ohio St.L.J. 481 (1991). Whether such applications of Title VII are necessarily unconstitutional has not yet been fully explored. *But see Robinson v. Jacksonville*

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[6] We do not mean that sexual propositions, *quid pro quo* overtures, discriminatory employment actions against women or "fighting words" involve the First Amendment.

*Shipyards, Inc.*, 760 F.Supp. 1486 (M.D.Fla. 1991). The Supreme Court's offhand pronouncements are unilluminating.[7]

[8,9] Matching the infirmity of appellee's hostile sexual environment verdict is the retaliation finding, supported only by R.U. Withmi's reference to an "E-I-E-I-O" complaint and a report on her EEOC complaint among the Association minutes routinely published in *The Silver Badge*. DeAngelis also asserts as proof of

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[7] The Court's pronouncement in *R.A.V.*, that "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices" does not mean that Title VII trumps First Amendment speech rights. Rather, as the next sentence in *R.A.V.* explains, conduct not targeted on the basis of its expressive content may be regulated. *R.A.V. v. City of St. Paul, Minnesota*, __U.S.___, ___ ____, 112 S.Ct. 2538, 2546-47, 120 L.Ed.2d 305 (1992). Citing *R.A.V.*, the Court in *Wisconsin v. Mitchell*, __ U.S. __, __, 113 S.Ct. 2194, 2200, 124 L.Ed.2d 436 (1993) reiterated that conduct not targeted on the basis of its expressive content may be regulated by Title VII. However, application of Title VII to the "conduct" in the case *sub judice* would do precisely that - regulate speech on the basis of its expressive content.

"retaliation" an article in *The Silver Badge* that reported the Association's intention to sue her for damages if her lawsuit against the Union proved groundless. A retaliation claim requires, in addition to proof of the plaintiff's protected activity, an adverse employment action, and a causal connection between the adverse action and the protected activity. *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322 (5th Cir. 1991). No matter how vehemently DeAngelis denounces these articles, they did not amount to an "adverse employment action" under any reasonable meaning of that term. The jury verdict lacks foundation.

*CONCLUSION*

Title VII cannot remedy every tasteless joke or groundless rumor that confronts women in the workplace. For DeAngelis, the price of success as the police department's first woman sergeant included transitory

ribbing by R.U. Withmi. The newsletter columns, however, were not so frequent, pervasive or pointedly insulting to DeAngelis as to create an objectively hostile working environment. The totality of circumstances do not prove that her working conditions were disadvantaged because she was mentioned in four R.U. Withmi columns. Likewise, three printed references to her EEOC complaint do not constitute retaliation under Title VII.[8]

The judgment of the district court is therefore *REVERSED* and *RENDERED* for the Association.

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[8] Because we reverse the underlying findings of liability, we also vacate the award of punitive damages.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

| | | |
|---|---|---|
| SYLVIA DEANGELIS | § | |
| | § | |
| V. | § | EP-92-CA-148 |
| | § | |
| EL PASO MUNICIPAL POLICE OFFICERS ASSOCIATION | § | |

AMENDED FINAL JUDGMENT

BEFORE THIS COURT, on the 16th day of August, A.D., 1993, the above-captioned cause was called for trial. Plaintiff SYLVIA DEANGELIS appeared by attorney of record and announced ready for trial. Defendants EL PASO MUNICIPAL OFFICERS ASSOCIATION appeared in person and by their respective attorneys of record and announced ready for trial. A jury of seven good and lawful jurors was duly impaneled and sworn. The Court prepared its Charge, the parties made their objections to the Charge, and the Court read its Charge to the Jury. The Jury on their oath, having heard the evidence, the argument of counsel, and the charge of

the court, retired and deliberated and ultimately returned an unanimous verdict on the 17th day of August, 1993. The Jury was discharged.

The Jury, in response to the definitions, instructions, and questions submitted to them by the Court, made the following findings of fact:

QUESTION 1.

DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFF WAS SUBJECTED TO SEXUAL HARASSMENT BY THE DEFENDANT?

ANSWER "YES" OR "NO."

ANSWER: YES.

PROCEED TO QUESTION 2.

QUESTION 2.

DO YOU FIND THAT THE PLAINTIFF WAS RETALIATED AGAINST BY THE DEFENDANT BECAUSE SHE OPPOSED WHAT SHE BELIEVED WAS SEXUAL HARASSMENT?

ANSWER "YES" OR "NO."

ANSWER: YES.

IF YOU ANSWERED "YES" TO QUESTION 1 OR 2, PROCEED TO QUESTION 3. IF YOU ANSWERED "NO" TO BOTH QUESTION 1 AND 2, STOP.

QUESTION 3.

WHAT AMOUNT OF MONEY, IF NOW PAID IN CASH, WOULD ADEQUATELY COMPENSATE THE PLAINTIFF BASED ON YOUR ANSWERS TO QUESTIONS 1 AND 2?

ANSWER IN DOLLARS AND CENTS, OR "NONE."

ANSWER: $10,000.00

PROCEED TO QUESTION 4.

QUESTION 4.

DID THE DEFENDANT INTENTIONALLY, WILLFULLY, OR WITH RECKLESS DISREGARD VIOLATE THE CIVIL RIGHTS OF THE PLAINTIFF?

ANSWER "YES" OR "NO."

ANSWER: YES.

IF YOU ANSWERED "YES" TO THIS QUESTION, PROCEED TO QUESTION 5. IF YOU ANSWERED "NO", STOP.

QUESTION 5.

WHAT AMOUNT OF MONEY, IF NOW PAID IN CASH, WOULD BE APPROPRIATE TO ASSESS AS PUNITIVE DAMAGES FOR THE DEFENDANT'S CONDUCT?

ANSWER IN DOLLARS AND CENTS, OR "NONE."

ANSWER: $50,000.00

THIS IS THE LAST QUESTION.

After consideration of the evidence presented, the relevant law, and pursuant to the Court's instructions, the Court is of the opinion the answered to the Courts jury questions were proper. Consequently, Defendant is liable to the Plaintiff in the amount of $60,000.00 ($10,000.00 + $50,000.00).

Plaintiff properly pled for declaratory relief. Based upon the jury verdict and this Court's independent review of the evidence, it is hereby ORDERED that Plaintiff have a DECLARATORY JUDGMENT. It is hereby DECLARED that the Defendant sexually

harassed the Plaintiff by printing, publishing and distributing the "R.U. Withmi" columns contained in Defendant's December 1987, February 1988, March 1988, August 1988, October 1988, January 1989, February 1989 and April 1990 newsletters.

It is further DECLARED that the Defendant retaliated against Plaintiff by publishing the February 1988 and February 1989 issues of the Union newspaper.

Further, Plaintiff submitted its Motion for Award of Attorneys' Fees and Costs and Affidavit in Support Thereof in the above-captioned cause. Plaintiff is commended for following the factors delineated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Plaintiff's Motion for Attorney's Fees indicates the customary rate of compensation for a similar case, considering Plaintiff's counsel's experience in this field, is between $150.00 and $200.00 per hour. The Court finds a rate of

$150.00 to be appropriate. Plaintiff requests reasonable attorneys' fees in the amount of $14,940.00 (representing a total of 99.6 hours of legal work), and costs of suit in the amount of $238.70. Accordingly,

IT IS ORDERED Judgment for Plaintiff SYLVIA DEANGELIS be entered as against Defendant EL PASO MUNICIPAL POLICE OFFICERS ASSOCIATION, for the sum of $60,000, with post-judgment interest thereon from the date of this judgment until paid as the rate of $4.21% per annum. Plaintiff is also hereby awarded to pre-judgment interest, at the maximum rate allowed by law, on the $10,000.00 award of compensatory damages, dating from December 1, 1987.

IT IS FURTHER ORDERED Judgment for Plaintiff SYLVIA DEANGELIS be entered as against Defendant EL PASO MUNICIPAL POLICE OFFICERS ASSOCIATION, for the sum of $14,940.00 for attorneys fees and $238.70 for non-court costs.

IT IS FURTHER ORDERED that Plaintiff's request for Declaratory Relief as noted above is GRANTED and DECLARED.

IT IS FINALLY ORDERED all other relief not specifically granted by the Final Judgment is hereby denied. The Clerk shall furnish a copy of the Final Judgment by regular mail to each attorney of record.

SIGNED this 2nd day of September, 1993.

(signed)
HONORABLE LUCIUS D. BUNTON, III
SENIOR DISTRICT JUDGE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
700 E. San Antonio Street
Room B406
El Paso, Texas 79901

Charge No. 315 88 0188 and
361 89 0524

Sylvia DeAngelis
1680 Dennis Babjack Charging Party
El Paso, TX 79936

City of El Paso
2 Civic Center Plaza Respondent
El Paso, TX 79901

El Paso Municipal
Police Officer's Association
3601 Rutherglen
El Paso, TX 79925 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue the following determination on the merits of this charge.

Respondents are an employer and an Association within the meaning of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq. and timeliness, and

all other requirements for coverage have been met.

Charging Party alleged that she and other female police officers were subjected to sexist, degrading, insulting, humiliating and derogatory remarks which were printed since December, 1987 and continuing in the Silver Badge, the monthly newsletter of the El Paso Municipal Police Officer's Association, in violation of Title VII of the Civil Rights Act of 1964, as amended.

Examination of the evidence reveals that the City of El Paso recognizes the El Paso Municipal Police Officer's Association as the exclusive bargaining agent for the certified fulltime paid employees who regularly serve in professional law enforcement capacity with the City's Police Department. While the Commission generally has jurisdiction over the City of El Paso Police Department, in this particular instance, it is determined that the Commission has no juris-

diction because the City of El Paso Police Department does not have control over the newsletter.

Examination of the evidence supports Charging Party's allegation. Records reveal that beginning in December, 1987 and continuing the columns titled "Looking Down Your Sights," written by R.U. Withmi, a pseudonym, and printed in the Association's newsletter, contained derogatory sexist remarks directed at the Charging Party and other female police officers. The evidence reveals that the newsletter and the columns are edited by police officers who are members of the El Paso Municipal Police Officer's Association. Section 703(c)(1) of Title VII states that "It shall be an unlawful employment practice for a labor organization (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin."

The Union is obligated to serve the interests of all members of the union "without hostility or discrimination towards any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Golden v. Local 55, ETC Assn. of Firefighters, 633 F.2d 817 (9th Cir.1980). A breach of the duty of fair representation constitutes an unfair employment practice for a union to discriminate against any individual because of sex or to cause or attempt to cause an employer to do so. Local Union No. 12, United Rubber, C.L. & L. WKRS. v. N.L.R.B., 368 F.2d 12, 24, (5th Cir. 1966) Cert. denied, 389 U.S. 837 (1967). Therefore, a union is responsible for maintaining a "working environment free of sexual intimidation," such as sexist remarks. Because the evidence reveals that the Silver Badge newsletter is published by the Union, written and edited by members of the Union,

it is established that the El Paso Municipal Police Officer's Association is not protected from liability.

The Commission finds that Charging Party and other female police officers were subjected to a hostile work environment in violation of Title VII of the Civil Rights Act, as amended, when the El Paso Municipal Police Officer's Association permitted sexist and derogatory comments in the Silver Badge columns. The Commission finds that Charging Party's terms and conditions of employment were adversely affected by the Silver Badge publications. A "hostile work environment" was created (1) when the articles were published, (2) when the offensive articles were published in five or more editions of the Silver Badge, (3)because the writer and editor of the columns are members of the Union, (4) because the columns were allowed to appear freely without restrictions from the Union, thereby encouraging others to

join in such activity, and (5) because the columns were directed to more than one individual. The Commission concludes that the failure of the El Paso Municipal Police Officer's Association to take immediate and appropriate action to delete the sexist remarks from the columns "Looking Down Your Sights" created an intimidating, hostile and offensive work environment for Charging Party and other female police officers. The evidence establishes that Charging Party was discriminated against by the El Paso Municipal Police Officer's Association because of her sex.

Although Charging Party does not make a separate allegation of retaliation, the evidence reveals that Charging Party was in fact retaliated against when an article dated February, 1988 in the Silver Badge disclosed that she had filed an EEOC charge. The elements of proving retaliation are as follows: (1) that Charging Party

participated in an activity protected by Section 704 of Title VII, (2) that the Union was aware of Charging Party's protected activity, (3) that she was subsequently treated in an adverse fashion by the agency (publication of fact charge was filed), and (4) that there is a causal connection between the adverse (public ridicule) treatment and the Charging Party's activity. The evidence demonstrates that "but for" her participation in the EEO process, the adverse action (publicity) would not have occurred. (Jack v. Texaco Research Center, 743 F.2d 1129, 1131 (5th Cir. 1984). The newsletter articles serve as direct evidence of the purpose and conduct of the Union, demonstrating retaliation against the Charging Party by the El Paso Municipal Police Officer's Association because she filed her Title VII charge.

Section 706(b) of Title VII requires that if the Commission determines that there is

reason to believe that violations have occurred, it shall endeavor to eliminate that alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion. Having determined that there is reason to believe that violations have occurred, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. A representative of this office will be in contact with each party in the near future to begin the conciliation process. Disclosure of information obtained by the Commission during the conciliation process will be made in accordance with Section 706(b) of Title VII and Section 1601.26 of the Commission's Procedural Regulations.

When the Respondent declines to enter into settlement discussions, or when the Commission's representative for any other reason, is unable to secure a settlement

acceptable to the Commission, the Director shall so inform the parties in writing and advise them of the court enforcement alternative available to the Charging Party, aggrieved persons, and the Commission.

On Behalf of the Commission:

Date: 03-26-90 (signed)
Eliazar Salinas
Area Director

## *LOOKING DOWN YOUR SIGHTS*

By R.U. Withmi *(as edited by Hank DiMatteo)*

This here episode of the continuing circus finds me in front of the Sears building with my Academy Joe UTEP is great weenie partner. We justa been on the plateau of indecision AKA the Chiefs Office alookin' for Court Liaison. It woulda seemed natural that they woulda put that thar CL office near the front so that us workin' troops could get in and out quick ... BUT N-O-O-O! they make a parson hump it through the valley of beige paint to a closet for a signature! Oh well, I guess they need to see some live faces sometimes in the petrified forest!

We had a hell-uva BS session at shift meeting (a place REMFs know nuthin' about!) regarding women in combat. They made a whole lot'a noise in the press about some Captin' Woman in Panama which got a few

loose rounds thrown at'em! Now that's real combat! In reality, the PDF ran away and thar was no combat! Now thar sayin' women outa be in combat on a regular basis! Let's face it! broads are just too small and can't deal with man at his root, gut only the strongest survive level! Back in the northern highlands of the Nam, we'd set up an ambush, set them claymores off and basically hose'em down in cold blood! I say, can the women do that? Ever'one answers NO! My point made! Uncle Sam says no and not for just any ole' reason. I wonder if'n they could carry a 55# rucksack all day and fight! How about not takin' a bath for 20 or 30 days with heat and humidity high! Separate toilets? How about humpin' 5 or 6 klicks in the rain? When tha S_____ really happens, its the savage in you that helps you survive! Women ain't got it; for we'all just made differen't! Women, men and combat just don't mix for it ain't in

the Lards plan! Of course, the Libbers just can't take that!

So-o-o-o me being tha' lover of hate and discontent, I tell ever'one in the meetin' that tha' same applies to police work! Now this makes ever'one real quiet because no one wants to admit it and no one wants to live up to their convictions! Oh shure, anyone can write reports, and anyone can direct traffic but when the S_____ really hits the fan, ya don't turn to the closest 110# female to back you up. Of course, I know that by lookin' around most of them thar 110 pounders are now 140+ but tha eeefect is still tha same! Men have an instrictive desire to take care of the lil' woman and that's just nature! Tryin' to aforce things to work that don't naturally fit is a bad idea; an' it gets worse when lives are at stake! Sure, Academy Joe tells me that this job is one of brains and not brawn! But try talkin' them 90s to gettin'

in tha car, or them bikers to move, or them cholos to leave and that talkin' don't work all the time! Ya gotta have some sorta round house punch to back you up when all else fails, and it will fail more often than not! But no one wants to admit that! Truth hurts! I can't help but think that them thar Academy hill boys haven't had those same thoughts!

Physically, the police broads just don't got it! Different standards or not, on the real streets the crooks don't fight women different than men! Why shoot, a guy weighing 140 pounds is just a lil' bird to me, but a fit to fight police broad of 140 pounds ain't just around that often! Someone tell me I'm wrong! Just like war, thar are some things in police work that are kinda unpleasant and require gut physical kick ass strength! Hell, in the Nam prisoners were always tortured by them cutie lil' Arvn boys, and rape of enemy civilians

was always goin' on which is just parta combat, I guess! Again, its that root savagery that takes over, and helps a guy survive! Tha' same thing applies to police work! Why hell!, we is outa line when we hire them weenie lil' boys you been a seein' around lately! Why even my Academy UTEP Joe weenie had problems the other night with that 9th grader he had to wrestle! SHE almost got the best of him too! Just made me shake my head in shame! Now it is true that thar are some police broads that have impressed EVEN me, but you can count them on you right hand usin' only two or three fingers! Its not a question of chauvinism, its just tha principle of might makes right, and the public depends upon us to have that thar might when it comes down to it! And its comin' down to it a more often than you think!

Well, anyways, ever'one just glared at me when I said that thar bits o-truth

especially them cutie police broads and them weenie guys. Personally, I like havin' women in the bag around because thar justa hair bit better to look at (just a hair though...)! But the next time you see them police broads gettin' cared for just a lil' bit different, or that three striper or LT. talkin' to 'em with just a bit of extra smile, then you think of what I said! It ain't wrong, its just instinct! And don't think they don't like it too! But when someone gets hurt AGAIN think again why! No sir-e-e-bob! police work and women and weenie men just don't mix for many of them thar reasons that combat and women won't either! And hell, for you REMFs, it IS combat out thar these days and only the tough will survive! So get tough in the mind, tough in the punch, start smokin' ceegars, chasin' girls, drinkin' beer, and hatin' amoeba dispatchers and maybe you'll survive this here circus! I'm sorry you

ACLU types didn't like readin' the truth, but thars some things in life you must just accept. Believe me, I been thar and it was no place for the weak or woman. Water'n oil just don't mix in fightin' a fire! Oh well, don't forget to keep your head down and guns ablazin'! See you next month!

February 27, 1990

TO: All Police Department Employees

FROM: John Scagno, Chief of Police

SUBJECT: Discrimination and Sexual Harassment

Last week, I was informed of incidents that may give rise to allegations of sexual harassment and discrimination in this Department.

As per established policy, this will not be accepted within the Police Department. When an incident is reported, it will be investigated and, if proven, disciplinary action will be taken.

In the last issue of the "Silver Badge" an article by R.U. Withmi attacked female police officers. I found this article to be personally distasteful and divisive, and there have been comments made that the article was discriminatory. I would like to point out to the writer or writers of this

article as well as to the editors who are responsible for this article, that although the "Silver Badge" is not a Departmental publication, you are still Police Department employees, and the freedom of speech guaranteed under the First Amendment of the Constitution does not allow you to violate the law or a rule or a procedure or engage in activity that constitutes sexual harassment of your fellow officers.

With this memo, I am putting all Department employees on notice that any form of discrimination or sexual harassment cannot and will not be tolerated by the El Paso Police Department. Where necessary, appropriate disciplinary action will be taken.